No.

In the Supreme Court of the United States

RICKY LEE SMITH,

Petitioner,

v.

NANCY A. BERRYHILL, Deputy Commissioner for Operations, Social Security Administration,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Social Security Act provides for judicial review of administrative decisions rejecting benefits claims: "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party," may obtain judicial review of that decision in federal court. 42 U.S.C. § 405(g).

Disability benefit claims are initially heard by an administrative law judge; adverse decisions may be appealed to the Appeals Council. Appeals Council decisions rejecting a claim on the merits are subject to judicial review. But the courts of appeals disagree about whether judicial review is available when the Appeals Council finally rejects a claim on the ground that the claimant's administrative appeal was not timely.

The question presented is whether the Appeals Council's decision to reject a disability claim on the ground that the claimant's appeal was untimely is a "final decision" subject to judicial review under Section 405(g).

TABLE OF CONTENTS

Page

Question Presented i
Table of Authorities iv
Opinions Below 1
Jurisdiction 1
Statutory and Regulatory Provisions Involved 1
Statement 3
Reasons for Granting the Petition 8
A. There Is An Acknowledged Conflict Over The Question Presented. 8
1. In the Eleventh Circuit, Appeals Council dismissals are deemed "final decisions" subject to judicial review. 8
2. Other courts of appeals hold that Appeals Council dismissals are not reviewable. 10
3. The conflict is entrenched. 12
B. The Question Presented Has Great Importance. 13
1. Disability assistance is vital for families. 13
2. Judicial review of agency action is criti-cal to ensuring fair action by agencies. 14
C. The Sixth Circuit Erred. 16
Conclusion 21
Appendix A – Court of appeals panel opinion (January 26, 2018) 1a
Appendix B – District court order (May 11, 2018) 16a

Appendix C – District Court order (January 12, 2017)..... 22a

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. *Heckler*,
799 F.2d 131 (4th Cir. 1986) 10

Bacon v. *Sullivan*,
969 F.2d 1517 (3d Cir. 1992) 10

Bagood v. *Commissioner of Soc. Sec. Admin.*,
2017 WL 362686 (D. Ariz. 2017) 11

Bannister v. *Commissioner of Soc. Sec. Admin.*,
2014 WL 2171220 (M.D. La. 2014) 10

Bennett v. *Spear*,
520 U.S. 154 (1997) 18

Bloodsworth v. *Heckler*,
703 F.2d 1233 (11th Cir. 1983) ..... *passim*

Bowen v. *Michigan Acad. of Family Physicians*,
476 U.S. 667 (1986) 4

Brandtner v. *Department of Health & Human Servs.*,
150 F.3d 1306 (10th Cir. 1998) 5, 11

Califano v. *Sanders*,
430 U.S. 99 (1977) ..... *passim*

Counts v. *Commissioner of Soc. Sec.*,
2010 WL 5174498 (M.D. Fla. 2010) 15, 21

Crook v. *Colvin*,
2014 WL 773692 (W.D. Mo. 2014) 10

Cuozzo Speed Techs., LLC v. *Lee*,
136 S. Ct. 2131 (2016) 16

Davis v. *Colvin*,
2013 WL 1174157 (M.D. Fla. 2013) 14

Dietsch v. *Schweiker*,
700 F.2d 865 (2d Cir. 1983) 11

Farrow v. *Astrue*,
2012 WL 4925939 (E.D.N.C. 2012) 9

Harper v. *Bowen*,
813 F.2d 737 (5th Cir. 1987) 10, 12, 19

Lindahl v. *Office of Personnel Mgmt.*,
470 U.S. 768 (1985) 16

Mach Mining, LLC v. *EEOC*
135 S. Ct. 1645 (2015) 4, 16

Matlock v. *Sullivan*,
908 F.2d 492 (9th Cir. 1990) 11

Morris v. *Berryhill*,
2017 WL 600089 (M.D. Ala. 2017) 12

Nicosia v. *Barnhart*,
160 F. App'x 186 (3d Cir. 2005) 10

Pizarro v. *Commissioner of Soc. Sec.*,
2013 WL 847331 (M.D. Fla. 2013) 15

Quarles v. *Colvin*,
2016 WL 4250399 (S.D. Ala. 2016) 12

Ramirez v. *Colvin*,
2016 WL 9711362 (D.N.M. 2016) 11

Rice-McKenzie v. *Colvin*,
2017 WL 2960507 (D. Conn. 2017) 11

Smith v. *Heckler*,
761 F.2d 516 (8th Cir. 1985) 8, 10

Stone v. *Heckler*,
778 F.2d 645 (11th Cir. 1985) 8, 12

Walker v. *Commissioner of Soc. Sec.*,
2013 WL 3833199 (M.D. Fla. 2013) 15

Zinermon v. *Burch*,
494 U.S. 113 (1990) 15

Statutes, Rules and Regulations

20 C.F.R. § 404.968 ..... 4, 6

20 C.F.R. § 416 ..... *passim*

42 U.S.C. § 405 ..... *passim*

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David Fahrenthold, *The Biggest Backlog in the Federal Government*,
Wash. Post (Oct. 18, 2014) 14

Melissa M. Favreault et al., *How Important Is Social Security Disability Insurance to U.S. Workers?*, Urban Inst., 1 (June 2013) 13

Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*,
17 Fla. St. U. L. Rev. 199 (1990) 14

Emily Palmer, *On Her Own, Raising Twin 'Princesses' with Special Needs*,
N.Y. Times (Nov. 22, 2017) 13

U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending June 30, 2017, U.S. Courts (2017) 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ricky Lee Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 880 F.3d 813. The orders of the district court (App., *infra*, 16a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2018. On April 19, Justice Kagan entered an order extending the time for filing a certiorari petition to and including May 25, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 405(g) and (h) provide in relevant part:

> (g) Judicial Review.
>
> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the

> plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia.
>
> (h) Finality of Commissioner's decision.
>
> The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

Regulations issued by the Department of Health and Human Services and codified in Part 416 of Title 20 of the Code of Federal Regulations state:

> 416.1468. (a) Time and place to request Appeals Council review. You may request Appeals Council review by filing a written request. You should submit any evidence you wish to have considered by the Appeals Council with your request for review, and the Appeals Council will consider the evidence in accordance with § 416.1470. You may file your request at one of our offices within 60 days after the date you receive notice of the hearing decision or dismissal (or within the extended time period if we extend the time as provided in paragraph (b) of this section).

(b) Extension of time to request review. You or any party to a hearing decision may ask that the time for filing a request for the review be extended. The request for an extension of time must be in writing. It must be filed with the Appeals Council, and it must give the reasons why the request for review was not filed within the stated time period. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 416.1411.

416.1471. The Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended.

416.1472. The dismissal of a request for Appeals Council review is binding and not subject to further review.

STATEMENT

The courts of appeals have acknowledged a longstanding, entrenched disagreement over an oft-recurring question: whether the Social Security Appeals Council's decision to reject a disability claim on the ground that the claimant's appeal was untimely is a "final decision" subject to judicial review under Section 405(g). The Eleventh Circuit has held that such decisions are reviewable, and the Social Security Commission has issued an acquiescence ruling applicable in that circuit only. Several other circuits, including the court below, have expressly rejected the Eleventh Circuit's holding.

Review is warranted. This question arises in scores of cases each year; it is always a threshold, dispositive issue; it goes to the fundamental balance of authority between administrative agency and federal court; and the decision below, which denied judicial review, is almost certainly wrong.

A. Legal Background.

"Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015). This Court therefore applies a "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

Title II of the Social Security Act expressly provides for judicial review of all "final decision[s]" of the Commissioner of Social Security. 42 U.S.C. § 405(g). Whether a court has jurisdiction to review a particular decision therefore depends on whether it constitutes a "final decision" by the Commissioner.

The procedure for adjudicating Social Security disability benefits claims begins with an initial decision by an administrative law judge (ALJ). If the claimant objects to the ALJ's determination regarding his claim, the claimant may appeal that determination to the Appeals Council. See generally 20 C.F.R. §§ 416.1467 to 416.1482. The deadline for requesting Appeals Council review is 60 days from receipt of notice of the ALJ's decision. *Id.* §§ 404.968, 416.1468. An out-of-time request for review is allowable where the claimant establishes "good cause" for not appealing in a timely manner. *Ibid.*

The regulations provide that "[t]he Appeals Council will dismiss your request for review if you

did not file your request within the stated period of time and the time for filing has not been extended." 20 C.F.R. § 416.1471. They further state that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." *Id.* § 416.1472.

If a request for Appeals Council review is not dismissed, the Council "may deny a party's request for review or it may decide to review a case and make a decision." 20 C.F.R. § 416.1481. "The Appeals Council's decision, or the decision of the administrative law judge if the request for review is denied, is binding unless you or another party file an action in Federal district court, or the decision is revised." *Ibid.*

The courts of appeals disagree on whether an Appeals Council dismissal of a request for review on the grounds of untimeliness constitutes a "final decision" under Section 405(g). Compare *Brandtner* v. *Department of Health & Human Servs.*, 150 F.3d 1306, 1307 (10th Cir. 1998) ("The dismissal as untimely is not a decision on the merits or a denial of a request for review by the Appeals Council, both of which constitute final decisions and can be reviewed by the federal district court."), with *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1237 (11th Cir. 1983) ("Neither the statute nor the regulations make any distinction in regard to rights of judicial appeal between dismissals and determinations on the merits by the Appeals Council. Both are equally final and both trigger a right to review by the district court.").

B. Factual and Procedural Background.

Petitioner Ricky Lee Smith initially applied in September 1987 for supplemental security income

resulting from disability. App., *infra*, 2a. Smith suffered from a recurrent post-operative tumor on his spine, as well as resultant pain in his back, feet, and left leg, with severe exertional limitations and recurrent urinary infections due to his need to self-catheterize since 1987.

An ALJ issued a decision in Smith's favor in October 1988, and he received benefits until 2004, when he was found to be ineligible because his financial resources exceeded the permissible limit. App., *infra*, 3a.

Smith filed a new application for supplemental security income in August 2012, alleging additional medical conditions as a result of his original disability, including spinal disorders, diverticulitis, hypertension, and depression. App., *infra*, 3a. The claim was denied, and denied again upon reconsideration. *Ibid.*

Smith timely filed a request for a hearing before an administrative law judge. ALJ Robert Bowling conducted a videoconference on February 18, 2014. App., *infra*, 3a. On March 26, 2014, a different ALJ, Don Paris, signed a decision on behalf of ALJ Bowling, denying Smith's claim. *Ibid.*

Smith asserts that he mailed to the Appeals Council on April 24, 2014, a written request for review of ALJ Paris's decision—within the 60-day period for filing an appeal. App., *infra*, 3a; 20 C.F.R. §§ 404.968, 416.1468.

On September 21, 2014, Smith faxed a letter to the Social Security Administration asking about the status of his appeal. App., *infra*, 3a. He attached a copy of his written request to appeal, dated April 24, 2014. *Ibid.* A claims representative responded in a

letter dated October 1, 2014, stating that the Administration had not received Smith's request for an appeal. *Ibid.* The representative then mailed to the Appeals Council a completed form requesting review, along with Smith's written request for review. *Id.* at 4a. The representative informed Smith that his appeal request was filed as of that date, October 1, 2014. *Ibid.*

Smith then mailed to the Appeals Council via first-class mail a copy of his April 24, 2014 appeal—together with a statement from his counsel affirming that the appeal had been mailed on April 24, 2014, within the filing deadline. App., *infra*, 4a & n.1. On November 6, 2015, the Appeals Council dismissed the request for review as untimely, finding no good cause to extend the time for filing an appeal. *Id.* at 4a.

Smith then commenced this action in the United States District Court for the Eastern District of Kentucky, seeking judicial review of the Appeals Council's decision under 42 U.S.C. § 405(g). Smith asserted that the Appeals Council had improperly dismissed his request for review.

The district court dismissed the complaint, holding that it lacked subject matter jurisdiction to hear the claim. App., *infra*, 8a.

The court of appeals affirmed. It held that the Appeals Council's dismissal of Smith's untimely request for review was not a "final decision" subject to judicial review under Section 405(g). App., *infra*, 8a. The court observed that, while "the Eleventh Circuit sees this issue differently," the "majority view is that the Appeals Council's decision to hear an untimely request for review is discretionary, and refusals of

such requests do not constitute 'final decisions' reviewable by district courts." *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

A. There Is An Acknowledged Conflict Over The Question Presented.

The courts of appeals are in clear conflict over the question presented—and both the courts and the federal government have recognized the disagreement.

The Eleventh Circuit held in *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983), that Appeals Council dismissals are subject to judicial review. Other courts have stated that "*Bloodsworth* * * * must be rejected." *Smith* v. *Heckler*, 761 F.2d 516, 519 (8th Cir. 1985). The Eleventh Circuit, in turn, has reaffirmed that *Bloodsworth* "remains binding precedent" notwithstanding the view of other courts of appeals. *Stone* v. *Heckler*, 778 F.2d 645, 648 (11th Cir. 1985).

The Social Security Administration follows different procedures for claimants in the Eleventh Circuit as a result of the conflict—informing them that they are entitled to judicial review of dismissal decisions. Such notices are not provided to claimants in other circuits.

Only this Court can restore uniformity on an issue affecting Americans' ability to obtain judicial review of the denial of a vital government benefit.

1. *In the Eleventh Circuit, Appeals Council dismissals are deemed "final decisions" subject to judicial review.*

In *Bloodsworth*, the Eleventh Circuit determined that an "'administrative decision declining to extend

time and review the merits * * * certainly is 'final'" and "fulfill[s] the statutory requirements of section 405(g)." 703 F.2d at 1236, 1239. The court explained that "the Appeals Council decision not to review *finalizes* the decision made after a hearing by the administrative law judge" denying the benefits claim. *Id.* at 1239.

Disallowing review, the court continued, would leave a claimant "permanently in limbo." *Bloodsworth*, 703 F.2d at 1239. "[T]he claimant would never have a 'final' decision, because the decision of the administrative law judge would not be final until the Appeals Council had reviewed it on the merits. But the claimant would certainly be 'finished' because Appeals Council dismissals are reviewable only by appeal to the federal district court." *Ibid.*

The Eleventh Circuit considered, and rejected, the claim that Appeals Council dismissals are not final under *Califano* v. *Sanders*, 430 U.S. 99 (1977). *Bloodsworth*, 703 F.2d at 1239. In *Sanders*, this Court held that Section 405(g) does not permit courts to review denials of a request by the Appeals Council "to reopen a claim of benefits" previously rejected in a final decision. 430 U.S. at 107.

The Eleventh Circuit held that *Sanders* did not apply because "review and reopening play fundamentally different roles in the process of administrative decision making and have significantly different effects upon the finality of administrative decisions." *Bloodsworth*, 703 F.2d at 1237. "The first review by the Appeals Council is a normal stage in the administrative review procedure, available as of right to any [dissatisfied] party," but the "reopening of a case is an extraordinary measure, affording the oppor-

tunity of a second excursion through the decision making process." *Id.* at 1237-1238.

The *Bloodsworth* court therefore proceeded to review the Appeals Council's dismissal under the abuse of discretion standard. 703 F.2d at 1239.

2. Other courts of appeals hold that Appeals Council dismissals are not reviewable.

Seven courts of appeals have squarely rejected *Bloodsworth*, holding instead that Appeals Council dismissals on untimeliness grounds are not "final decisions" subject to judicial review.

The **Third Circuit** reached this conclusion in *Bacon* v. *Sullivan*, 969 F.2d 1517, 1520-1521 (3d Cir. 1992). It acknowledged the disagreement with the Eleventh Circuit. *Ibid.* *Bacon* remains controlling in the circuit. See, *e.g.*, *Nicosia* v. *Barnhart*, 160 F. App'x 186, 188 (3d Cir. 2005).

The **Fourth Circuit** in *Adams* v. *Heckler*, 799 F.2d 131, 133 (4th Cir. 1986), "reject[ed] the reasoning of *Bloodsworth*." *Adams* remains controlling in the circuit. See, *e.g.*, *Farrow* v. *Astrue*, 2012 WL 4925939, at *2 (E.D.N.C. 2012).

The **Fifth Circuit** reached the same conclusion in *Harper* v. *Bowen*, 813 F.2d 737, 741 (5th Cir. 1987), stating that it did "not agree with the Eleventh Circuit's decision in *Bloodsworth*." *Harper* remains controlling in the circuit. See, *e.g.*, *Bannister* v. *Commissioner of Soc. Sec. Admin.*, 2014 WL 2171220, at *2 (M.D. La. 2014).

The **Eighth Circuit** in *Smith* v. *Heckler*, 761 F.2d 516, 519 (8th Cir. 1985), held that "*Bloodsworth* * * * must be rejected." *Smith* remains controlling in

the circuit. See, *e.g.*, *Crook* v. *Colvin*, 2014 WL 773692, at *1-2 (W.D. Mo. 2014).

The **Ninth Circuit** in *Matlock* v. *Sullivan*, 908 F.2d 492, 494 (9th Cir. 1990), "decline[d] to follow" [*Bloodsworth*]." *Matlock* remains controlling in the circuit. See, *e.g.*, *Bagood* v. *Commissioner of Soc. Sec. Admin.*, 2017 WL 362686, at *2 (D. Ariz. 2017).

The **Tenth Circuit** in *Brandtner* v. *Department of Health & Human Services*, 150 F.3d 1306, 1307 n.2 (10th Cir. 1998), stated that it "disagree[d] with the Eleventh Circuit's holding in *Bloodsworth*," and "specifically decline[d] to adopt that court's reasoning on this issue." *Brandtner* remains controlling in the circuit. See, *e.g.*, *Ramirez* v. *Colvin*, 2016 WL 9711362, at *2 (D.N.M. 2016), report and recommendation adopted, 2017 WL 4232530 (D.N.M. 2017).

In the opinion below, the **Sixth Circuit** held that dismissals were not final—recognizing that "the Eleventh Circuit sees this issue differently." App., *infra*, 7a.

One additional court of appeals, the Second Circuit, adopted the majority rule prior to *Bloodsworth*, in *Dietsch* v. *Schweiker*, 700 F.2d 865, 867 (2d Cir. 1983). *Dietsch* remains controlling today. See, *e.g.*, *Rice-McKenzie* v. *Colvin*, 2017 WL 2960507, at *1-2 (D. Conn. 2017).

These courts of appeals largely rest their decisions on this Court's ruling in *Sanders*. See, *e.g.*, *Matlock*, 908 F.2d at 494 (noting that while "the Eleventh Circuit distinguished refusals to hear untimely petitions from refusals to reopen benefits claims," it disagreed that "a meaningful distinction [exists] between these two refusals"). Pointing to this Court's statement that Congress wished to "forestall

repetitive or belated litigation of stale eligibility claims" (*Sanders*, 430 U.S. at 108), they hold that review of Appeals Council dismissals would implicate "a similar issue" because it would also permit belated litigation. *Harper*, 813 F.2d at 741-742.

That analysis is directly contrary to the Eleventh Circuit's interpretation of *Sanders*.

3. The conflict is entrenched.

This clear conflict will not dissipate in the absence of this Court's intervention. Despite acknowledging the Eleventh Circuit's contrary view, no courts have joined it. And the Eleventh Circuit has steadfastly adhered to *Bloodsworth*. Indeed, even when it decided the case, it acknowledged it "was "aware of the contrary conclusion in [the Eighth Circuit]." *Bloodsworth*, 703 F.2d at 1239. The Eleventh Circuit has since stated that, "[a]lthough *Bloodsworth* has been explicitly or implicitly rejected by other circuit courts of appeal, it remains binding precedent in this circuit." *Stone*, 778 F.2d at 648.

Courts in the Eleventh Circuit regularly apply *Bloodsworth*. See, *e.g.*, *Morris* v. *Berryhill*, 2017 WL 600089, at *3 (M.D. Ala. 2017); *Quarles* v. *Colvin*, 2016 WL 4250399, at *3 (S.D. Ala. 2016) ("As the Commissioner concedes, it has long been the law of this Circuit that the Appeals Council's dismissal of a request to review as untimely is a 'final' decision subject to judicial review.").

Even more importantly, the Social Security Administration itself has recognized that the conflict will not dissipate by acquiescing to the Eleventh Circuit's decision. Acquiescence Ruling 99-4(11), 1999 WL 1137369 (S.S.A. Oct. 26, 1999). It therefore informs residents of "Alabama, Florida, or Georgia"—

and only residents of those States—that they may "request judicial review" "at the time of the Appeals Council dismissal" on untimeliness grounds. *Id.* at *2.

Only this Court can restore uniformity on the question presented.

B. The Question Presented Has Great Importance.

Judicial review of administrative agency decisions provides critically important protections against unjustified administrative agency decisions. That protection is especially important in the context of disability benefit decisions given the importance of these benefits to the lives of the statute's beneficiaries, the large number of Americans affected, and the well-documented flaws in Appeals Council decision-making.

1. Disability assistance is vital for families.

The Social Security Administration's disability program is critically important to American families. Disability insurance "provides a crucial lifeline for some of the nation's most vulnerable citizens." Melissa M. Favreault et al., *How Important Is Social Security Disability Insurance to U.S. Workers?*, Urban Inst., 1 (June 2013), perma.cc/N7PB-Z4MC. Disability insurance payments "account for the majority of family income for nearly half" of recipients and "more than two-thirds" of unmarried recipients. *Ibid.* Even for those who receive these benefits, family incomes "fall well below the average for nondisabled Americans," and 31 percent of disability insurance recipients live in poverty. *Id.* at 1, 7.

The Batista family provides an example. See Emily Palmer, *On Her Own, Raising Twin 'Princess-*

es' with Special Needs, N.Y. Times (Nov. 22, 2017), goo.gl/e9pZky. Ingrid Batista is a single mother raising twin four-year-old girls who both have Down syndrome and are on the autism spectrum. *Ibid.* The girls are unable to hear or speak, requiring Ms. Batista as a full-time caregiver. *Ibid.* Ms. Batista works when a relative can babysit, but the $1,322 a month in Social Security disability support received for her daughters provides more than half of the family's income. *Ibid.*

2. Judicial review of agency action is critical to ensuring fair action by agencies.

Supervision of administrative agencies by the courts is necessary to ensure that agency action is lawful and fair. This is especially important when an agency is overworked. In 1990, for instance, Appeals Council members could only spend ten to fifteen minutes reviewing an average case. Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199, 257 (1990). Decisions were rushed and claimants complained that opinions were "conclusory, incomplete, and not fully comprehensible." *Id.* at 257 n.308. The Appeals Council was said to be "swallowed whole by its docket" then. *Id.* at 267.

In 2014, more than 150,000 people waited for Appeals Council decisions, on average for 374 days. David Fahrenthold, *The Biggest Backlog in the Federal Government*, Wash. Post (Oct. 18, 2014), perma.cc/NQ7S-F48F.

Judicial review by courts in the Eleventh Circuit has provided a vital check against the Appeals Coun-

cil's errors. Courts regularly find that the Appeals Council was unjustified in dismissing a claim. See, *e.g.*, *Davis* v. *Colvin*, 2013 WL 1174157, at *6 (M.D. Fla. 2013) (holding that the Appeals Council's dismissal on grounds of untimeliness was unfounded); *Counts* v. *Commissioner of Soc. Sec.*, 2010 WL 5174498, at *10 (M.D. Fla. 2010) (holding that a dismissal was "not based on substantial evidence"); *Walker* v. *Commissioner of Soc. Sec.*, 2013 WL 3833199, at *7-8 (M.D. Fla. 2013) (reversing the decision of the Appeals Council when it incorrectly failed to consider new evidence); *Pizarro* v. *Commissioner of Soc. Sec.*, 2013 WL 847331, at *4 (M.D. Fla. 2013) (upholding a magistrate judge's decision that a dismissal was not based on substantial evidence).

In contrast, under the Sixth Circuit's interpretation, review is limited to procedural due process claims. App., *infra*, 8a. That leaves little opportunity for viable challenges. A procedural due process inquiry "examine[s] the procedural safeguards built into the statutory or administrative procedure [] effecting [a] deprivation," but does not review the "ultimate merits" of the decision. *Zinermon* v. *Burch*, 494 U.S. 113, 126, 139 (1990).

The Eleventh Circuit's experience shows that its rule does not overwhelm the courts. Indeed, the district courts of the Eleventh Circuit actually see a lower percentage of Social Security cases than other courts in other circuits. In the Eleventh Circuit, Social Security cases make up 6.7% of all civil cases in district court, compared to 7.9% in district courts in the other circuits. *U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending June 30, 2017*, U.S. Courts (2017), perma.cc/LV2D-RLB7.

If the opinion below stands uncorrected, district courts in the Sixth Circuit will refuse to hear statutory challenges to Appeals Council dismissals. But, as the rulings by courts within the Eleventh Circuit indicate, some of those dismissals were almost certainly due to agency error. Judicial review may only affect the outcome of a minority of disability cases, but the agency nevertheless should not have the unilateral authority to sweep cases under the rug—especially when the statutory text precludes that result, as we next discuss.

C. The Sixth Circuit Erred.

An acknowledged division of authority on an issue of great practical importance is reason enough to grant the petition. Certiorari is all the more necessary here because the Sixth Circuit's decision below is wrong.

This Court has long recognized that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015). While the "presumption is rebuttable," the agency bears a "heavy burden" in attempting to show that Congress "prohibit[ed] all judicial review." *Ibid.*

Indeed, judicial review is available even where a statute "plausibly can be read as imposing an absolute bar to judicial review." *Lindahl* v. *Office of Personnel Mgmt.*, 470 U.S. 768, 779 (1985). "[I]f a provision can reasonably be read to permit judicial review, it should be." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2150 (2016) (Alito, J., concurring in part and dissenting in part) (summarizing the case law).

Judicial review "enforces the limits that *Congress* has imposed on the agency's power. It thus serves to buttress, not 'undercut,' Congress's objectives." *Id.* at 2151.

The availability of judicial review here turns on Section 405(g), which provides in relevant part that "[a]ny individual, *after any final decision of the Commissioner of Social Security made after a hearing* to which he was a party, * * * may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow." 42 U.S.C. § 405(g). This case therefore depends on whether the Appeals Council's dismissal of Smith's request for review constitutes a "final decision" by the Commissioner within the meaning of Section 405(g).[1]

The statutory text makes clear that judicial review is available. Petitioner's request for review was denied on grounds of untimeliness by the Appeals Council, and that decision precluded any further administrative review of his claims—administrative review of his claim was at an end.

For that reason, an Appeals Council dismissal of a claim on grounds of untimeliness is indisputably a "final decision." A contrary interpretation is inconsistent with the word's plain meaning.

There is no doubt that the Appeals Council decision is "binding" on the claimant, and that claimant

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[1] There is no question that the "after a hearing" requirement is satisfied here because the ALJ conducted a hearing on Smith's claim. See p. 6, *supra*.

has no further steps in the administrative review process. See generally 20 C.F.R. §§ 416.1404 to 416.1482. In other words, the Commissioner simply has not met the "heavy burden" of demonstrating that the statute precludes judicial review in these circumstances.

The Sixth Circuit ignored the plain language of the statute and held that an Appeals Council dismissal is not a "final decision" because the Council does not consider the appeal of the ALJ's decision on the merits. App., *infra*, 7a-8a. But that distinction is entirely irrelevant: "Neither the statute nor the regulations make any distinction" between decisions on the merits and other dispositions. *Bloodsworth*, 703 F.2d at 1237. In both situations, "the Appeals Council decision not to review *finalizes* the decision made after a hearing by the administrative law judge, fulfilling the statutory requirements of section 405(g)." *Id.* at 1239.

The Sixth Circuit's approach also conflicts with this Court's definition of finality under the Administrative Procedure Act. The Court has long held that an agency action is "final" when it marks the "'consummation' of the agency's decision making process," and under which "rights or obligations have been determined," or from which "legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997).

The Appeals Council's dismissal of Smith's claim clearly falls within that definition. It is not a "tentative recommendation," but rather a decision with "direct and appreciable legal consequences." *Bennett*, 520 U.S. at 154. As the Fifth Circuit has conceded, a determination that an Appeals Council dismissal is not a "final decision" would "leave a claimant permanently in limbo," because the decision of the adminis-

trative law judge would *never* become "final" for the purposes of obtaining judicial review. *Harper*, 813 F.2d at 742.[2]

Unable to find an "unambiguous" preclusion of judicial review in the statute, the Sixth Circuit rested its holding on the Court's decision in *Califano* v. *Sanders*. App., *infra*, 5a-7a. But *Sanders* is wholly inapposite.

The claimant there had filed a claim for disability benefits and proceeded through all of the steps of administrative review. *Sanders*, 430 U.S. at 102-104. The claimant then did not seek judicial review of the Secretary's final decision. *Id.* at 102. Almost seven *years* later, the claimant filed a second claim alleging the same bases for eligibility, and an ALJ denied reopening of the case and dismissed the claim. *Id.* at 102-103.

This Court held that it lacked jurisdiction to consider a request "to reopen a claim of benefits" after the claim had been previously rejected. *Sanders*, 430 U.S. at 107-108. It held that the Social Security Act "clearly limits judicial review to a particular type of

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[2] The agency's regulation stating that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review" (20 C.F.R. § 416.1472) provides no basis for ignoring the plain statutory text. And even if the text were less clear, the canon of statutory construction establishing a presumption in favor of judicial review provides another basis for upholding the construction supported by the plain text. There simply is no ambiguity permitting deference to an agency interpretation. *Epic Sys., Inc.* v. *Lewis*, No. 16-285, slip op. 21 (May 21, 2018) ("deference is not due" under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), unless a court "is left with an unresolved ambiguity" after applying the relevant canons of statutory construction).

agency action, a 'final decision of the Secretary made after a hearing.' But a petition to reopen a prior final decision may be denied without a hearing." *Id.* at 108.

The denial of review here does not involve a second bite at the apple seven years after being afforded—and not utilizing—the opportunity to obtain judicial review. As the Eleventh Circuit has explained, "review and reopening play fundamentally different roles in the process of administrative decision making and have significantly different effects upon the finality of administrative decisions." *Bloodsworth*, 703 F.2d at 1237. Reopening offers the claimant a "bonus opportunity" for obtaining administrative reconsideration of a final decision, but the Appeals Council determination to dismiss a case as untimely is a "final decision" on one's claim, from which one can take an appeal to the district court. *Id.* at 1238.

The Sixth Circuit also cited *Sanders*'s reference to the frustration of the statute's 60-day limitation on judicial review of the Commissioner's decision. App., *infra*, 6a. But permitting review of Appeals Council dismissals for untimeliness retains the 60-day period for seeking judicial review, but acknowledges that the "final decision" occurred when the Appeals Council dismissed the claim.

Indeed, this Court explained that "Congress' determination [] to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall *repetitive* or belated litigation of stale eligibility claims." *Sanders*, 430 U.S. at 108 (emphasis added). Permitting judicial review of Smith's claim does not enable repetitive litigation: this is his first opportunity to obtain judicial review of the agency's decision.

Petitioner has a strong argument that his appeal was timely, or alternatively that he should have been granted an extension.

Smith and his lawyer stated that Smith filed a timely appeal. Informed that his appeal had not been received, Smith provided a copy of his April 24, 2014 appeal, along with a statement from his counsel that affirmed that the appeal was mailed to the Appeals Council. App., *infra*, 4a & n.1.

These facts present precisely the sort of agency error that courts within the Eleventh Circuit review and correct in order to protect deserving claimants. See, *e.g.*, *Counts*, 2010 WL 5174498, at *1 (holding that the Appeals Council's decision to dismiss on the ground of untimeliness was not based on substantial evidence because the Administration failed to provide any evidence indicating that the written notice of the reconsideration determination was actually mailed to the claimant).

Just as the agency may sometimes fail to send notice to a claimant of an ALJ's decision, so too may it fail to record an appeal that it in fact receives.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2018

APPENDICES

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
PURSUANT TO SIXTH CIRCUIT I.O.P. 32.1(B)

File Name: 18a0017p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICKY LEE SMITH,

Plaintiff-Appellant,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

No. 17-5809

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 5:16-cv-00003—David L. Bunning, District Judge.

Decided and Filed: January 26, 2018

Before: MERRITT, GRIFFIN, and DONALD, Circuit Judges.

COUNSEL

ON BRIEF: Wolodymyr Cybriwsky, Prestonburg, Kentucky, for Appellant. Laura H. Holland, SOCIAL SECURITY ADMINISTRATION, Denver, Colorado, for Appellee.

OPINION

MERRITT, Circuit Judge. Ricky Lee Smith filed an application for supplemental security income resulting from disability. A hearing was conducted before an administrative law judge ("ALJ"). The ALJ issued an unfavorable decision, finding that Smith was not disabled under the Social Security Act. The notice of decision stated that Smith had sixty days to file a written appeal with the Appeals Council if he disagreed with the ALJ's decision. Smith's attorney claimed he timely mailed a request for review to the Appeals Council, but was unable to provide any independent evidence of this. The Social Security Administration did not receive the request until approximately four months after the time for appeal had expired. Finding no good cause for the untimeliness, the Appeals Council dismissed the appeal. Smith subsequently filed a civil complaint seeking review of the Appeals Council's dismissal of his untimely request for review. The district court dismissed his complaint for lack of jurisdiction and because Smith made no colorable constitutional claims.

On appeal to this court, Smith alleges that he suffered due process violations because: (1) his request for Appeals Council review was timely submitted but dismissed as untimely, (2) a different ALJ signed his hearing decision than the one that presided over his hearing, and (3) the ALJ referenced Smith's 1988 favorable supplemental security income decision in his unfavorable decision denying income for new medical conditions, but failed to attach a copy of it as an exhibit. We hold that an Appeals Council decision to refrain from considering an un-

timely petition for review is not a "final decision" subject to judicial review in federal court. Further, for the reasons explained below, each of Smith's due process arguments fail. Therefore, we **AFFIRM** the order of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 18, 1987, Smith filed an application for supplemental security income resulting from disability. On October 13, 1988, an ALJ issued a favorable decision. Smith received benefits until 2004, when he was found to be over the resource limit.

Smith filed another application for supplemental security income on August 7, 2012, alleging additional medical conditions as a result of his original disability. The claim was initially denied, and denied again upon reconsideration.

Smith timely filed a request for a hearing before an ALJ. A hearing was conducted by videoconference before ALJ Robert Bowling on February 18, 2014. On March 26, 2014, ALJ Don Paris signed a decision on behalf of ALJ Bowling denying Smith's claim. Pursuant to the governing regulations, Smith had sixty days to appeal the decision to the Appeals Council. He claims that he mailed a written request for review to the Appeals Council on April 24, 2014.[1] On September 21, 2014, Smith faxed a correspondence to the Society Security Administration, inquiring as to the status of his appeal, and attaching a copy of his written request, which was dated April 24, 2014. A claims representative informed Smith in a letter dated October 1, 2014, that his request had not been placed in the "electronic folder," and that if the Appeals Council had received the request, it would have

mailed a receipt. The representative mailed a completed request for review form to the Appeals Council along with Smith's written request for review. The representative informed Smith that his appeals request was filed as of that day, October 1, 2014.[1] On November 6, 2015, the Appeals Council dismissed the request for review as untimely, having found no good cause to extend the time for filing because Smith's attorney could not provide evidence indicating that it was sent within the appropriate time.

Smith filed a civil action seeking review of the Appeals Council's dismissal. Smith alleged in his complaint that the Appeals Council improperly dismissed his request for review and that he suffered due process violations. The Commissioner moved to dismiss the complaint for lack of subject matter jurisdiction, and alternatively, for failure to state a claim. The district court determined that there was no judicial review available because the Appeals Council's dismissal of Smith's request for appeal as untimely did not constitute a final decision and Smith made no colorable constitutional claims. It subsequently granted the Commissioner's motion. Smith filed a motion for relief from the court's order, which the court denied. He now appeals.

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[1] Smith's attorney asserts that he timely mailed a written request for review using first-class mail in his court filings and in his correspondence with the Social Security Administration. However, other than his own testimony, he is unable to provide any proof that he mailed the request on April 24, 2014.

II. ANALYSIS

A. Jurisdiction

The threshold question is whether the decision of the Appeals Council not to consider Smith's untimely request for review was a "final decision" subject to judicial review under 42 U.S.C. § 405(g). We hold that it was not.

We review de novo a district court's dismissal for lack of subject matter jurisdiction. *See Willis v. Sullivan*, 931 F.2d 390, 395 (6th Cir. 1991). The Social Security Act limits judicial review to a "final decision" of the Commissioner made after a hearing. 42 U.S.C. § 405(g). When a claimant is not satisfied with an ALJ's hearing decision, the claimant may request review from the Appeals Council within sixty days of receipt of the decision. 20 C.F.R. §§ 416.1467-416.1468. The Appeals Council may "deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case" to an ALJ. *Id.* § 416.1467. If the claimant demonstrates good cause for missing the filing deadline, the regulations permit the Appeals Council to extend the time for filing an otherwise untimely request for review. *Id.* § 416.1468(b). If the Appeals Council dismisses the request for review as untimely, the dismissal is binding and not subject to further review. *Id.* §§ 416.1471-416.1472. Judicial review is available only after administrative exhaustion. *Id.* § 416.1400(a)(5).

In *Califano v. Sanders*, 430 U.S. 99, 108 (1977), the Supreme Court held that judicial review of a denial of a petition to reopen a prior final decision is unavailable in the absence of a colorable constitutional claim. The Court reasoned that, "an interpre-

tation that would allow a claimant judicial review simply by filing and being denied a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in [§] 205(g), to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits." *Id.*

We have not directly addressed the issue at hand in a published opinion, but we have addressed similar issues on which we can rely. In *Hilmes v. Secretary of Health & Human Services*, 983 F.2d 67, 68 (6th Cir. 1993), the claimant had sixty days to request a hearing before an ALJ after receiving a notice of award from the Social Security Administration. The claimant sought an extension of the request deadline, but then failed to request a hearing until after the extension had expired. *Id.* The ALJ subsequently dismissed the request for a hearing as untimely, and the Appeals Council declined to review the matter, although it noted that there had been no good cause for missing the extended deadline. *Id.* In affirming the district court's dismissal of the plaintiff's petition, we followed the *Sanders* rationale and held that the dismissal of a hearing request as untimely was unreviewable. *Id.* at 69-70. In subsequent unpublished cases, we have applied the *Sanders* and *Hilmes* rules to hold that an order from the Appeals Council dismissing a plaintiff's appeal as untimely is not a "final decision" as defined by the Social Security Act and regulations. *See Coleman v. Comm'r of Soc. Sec.*, No. 96-1395, 1997 WL 539674, at *2 (6th Cir. Aug. 29, 1997) (per curiam) (unpublished table decision); *Young v. Comm'r of Soc. Sec.*, No. 95-2357, 1996 WL 343527, at *1 (6th Cir. June 20, 1996) (unpublished table decision).

Turning to our sister circuits, the majority view is that the Appeals Council's decision to hear an untimely request for review is discretionary, and refusals of such requests do not constitute "final decisions" reviewable by district courts. *See, e.g.*, *Brandtner v. Dep't of Health & Human Servs.*, 150 F.3d 1306, 1307 (10th Cir. 1998); *Bacon v. Sullivan*, 969 F.2d 1517, 1520 (3d Cir. 1992); *Matlock v. Sullivan*, 908 F.2d 492, 494 (9th Cir. 1990) ("[P]ermitting claimants to obtain judicial review of denials of their requests for extensions of time would frustrate Congress' intent to forestall belated litigation of stale claims."); *Harper ex rel. Harper v. Bowen*, 813 F.2d 737, 743 (5th Cir. 1987) (holding that the Appeals Council's refusal to grant an extension and consider an untimely request for review is not, under *Sanders* and the Secretary's requirements for exhaustion, a "final decision"); *Adams v. Heckler*, 799 F.2d 131, 133 (4th Cir. 1986); *Dietsch v. Schweiker*, 700 F.2d 865, 867 (2d Cir. 1983). Only the Eleventh Circuit sees this issue differently. *See Bloodsworth v. Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983).

The Eighth Circuit expressed compelling reasoning for determining that the dismissal of an appeal for failure to timely file is not a final decision:

> The Appeals Council may dismiss a request for review if it is not filed within the stated time. 20 C.F.R. § 404.971 (1984). Such dismissal is binding and not subject to further review. *Id.* 404.972. Such action does not address the merits of the claim, and thus cannot be considered appealable, as can the Appeals Council's decisions and denials of *timely* requests for review. *See id.* §404.981. As we stated in *Sheehan*, "If the claimant may

> obtain review in this situation [late filing of an appeal] the Secretary's orderly procedures for processing disability claims mean little or nothing. If claimant may avoid the timely exhaustion of remedies requirement, any claimant could belatedly appeal his claim at any time and always obtain district court review of an ALJ's decision."

Smith v. Heckler, 761 F.2d 516, 518 (8th Cir. 1985) (quoting *Sheehan v. Sec'y of Health, Educ. & Welfare*, 593 F.2d 323, 326-27 (8th Cir. 1979)) (brackets in original). Similarly, we conclude that Appeals Council decisions to dismiss untimely petitions for review are not final decisions reviewable in federal court. Thus, the district court properly concluded it lacked jurisdiction under 42 U.S.C. § 405(g) unless Smith presented a colorable constitutional claim.

B. Due Process

The Supreme Court recognized that when a constitutional challenge is raised to an otherwise unappealable order, "access to the courts is essential to the decision of such questions." *Sanders*, 430 U.S. at 109. This court has interpreted this to mean that a reviewing court must determine whether the plaintiff has established a "colorable constitutional claim." *Cottrell v. Sullivan*, 987 F.2d 342, 345 (6th Cir. 1992). Absent this claim, a federal court has no jurisdiction to review the Appeals Council's decision. *See id.* The use of constitutional language to dress up a claim "does not convert the argument into a colorable constitutional challenge." *Ingram v. Sec'y of Health & Human Servs.*, 830 F.2d 67, 67 (6th Cir. 1987).

Smith claims that his due process rights were violated because: (1) the Appeals Council denied his request for review as untimely after he allegedly timely mailed the request, (2) a different ALJ signed the unfavorable decision than the ALJ that held his hearing, and (3) his 1988 decision was referenced by the ALJ but not attached to the decision as an exhibit. Smith argues that the district court's dismissal of his appeal is not supported by substantial evidence, actual evidence, the Commissioner's own regulations and policies, or judicial rulings. We address each argument in turn.

1. **Request For Review**

Smith does not argue that he lacked notice of the filing requirements. He instead argues that he did, in fact, timely file his notice of appeal. The district court determined that aside from his attorney's own testimony, Smith was not able to provide any proof that he mailed his written request on April 24, 2014. The court concluded that "[a]bsent independent evidence, such as a postmark or dated receipt, this Court cannot reverse the Appeals Council's determination that the written request for appeal was untimely." *Smith v. Comm'r*, No. 5:16-cv-00003-DLB (E.D. Ky. Jan. 12, 2017). Smith claims on appeal that this finding is contrary to the Commissioner's own regulations, specifically 20 C.F.R. § 404.630,[2] which he asserts "state[s] that the Commissioner is to use the date of the written statement as to be considered the date of filing." Further, he argues that the Commissioner's Hearings, Appeals, and Litigation Law

[2] Smith also claims that 20 C.F.R. § 404.633 supports his argument. However, § 404.633 has to do with misinformation being provided by an agency employee, which is not applicable here.

Manual, referred to as "HALLEX," "accepts the date of the written request as being the date filed, even if the postmark is unreadable or absent."

In *McKentry v. Secretary of Health & Human Services*, 655 F.2d 721, 722 (6th Cir. 1981), the disability claimant's application was denied without a hearing on the merits due to a determination that she failed to request a hearing and reconsideration of the initial denial of her claim within sixty days. The claimant's file contained a dated copy of a "Notice of Reconsideration," which advised that McKentry would need to request a hearing not later than sixty days after receiving the notice, but no evidence that it was actually mailed to her. *Id.* at 723. The claimant and her attorney filed sworn statements that they never received a copy of a notice of redetermination from the Social Security Administration. *Id.* at 722. The ALJ rejected these affidavits and dismissed the claimant's request for a hearing. *Id.* The Appeals Council agreed with the ALJ. *Id.* We reversed and remanded for a hearing on the merits after finding no evidence that the notice was ever mailed to the claimant. *Id.* at 724. We concluded that "[t]he presence of a piece of paper in the Department's file is not necessarily proof of mailing." *Id.*

The same reasoning applies here. Just as a dated piece of paper in the Department's file was not proof of mailing in *McKentry*, in this case, Smith's dated request for appeal and his attorney's testimony that he timely mailed the request is not proof that the request was actually mailed. Further, the Social Security Administration has no record of ever timely receiving the request and Smith was unable to provide a postmark or dated receipt. Taking into account this lack of independent evidence, there is no presump-

tion of receipt. *See Hobt v. Comm'r of Soc. Sec.*, 175 F. App'x 709, 710 (6th Cir. 2006) ("As this Court explained in *McKentry*, a presumption of receipt is inappropriate where there is no evidence that the notice was ever mailed."); *Crook v. Comm'r*, 173 F. App'x 653, 657 (10th Cir. 2006) ("Self-serving declarations of mailing, without more, are insufficient to invoke the presumption of delivery.") (internal quotations, brackets, and citations omitted); *cf. Carroll v. Comm'r*, 71 F.3d 1228, 1229 (6th Cir. 1995) (holding that the common law mailbox rule has no application where the IRS is involved and that "a taxpayer who sends a document to the IRS by regular mail, as opposed to registered or certified mail, does so at his peril"). Even if such a presumption were appropriate, however, it was effectively rebutted by the Administration's statement that it did not receive the request before October 1, 2014—approximately four months late. Further Smith, unlike the claimant in *McKentry*, had a hearing before an ALJ. The district court properly found that Smith did not suffer any due process violations.

Smith also relies on 20 C.F.R. § 404.630. That provision states that "[i]f a written statement, such as a letter, indicating your intent to claim benefits... is filed with us under the rules stated in § 404.614, we will use the filing date of the written statement as the filing date of the application" if certain additional requirements are met. However, § 404.614(a) states that "[e]xcept as otherwise provided in paragraph (b) of this section. . . a written statement, request, or notice is filed on the day it is received." Paragraph (b) goes on to say that the Social Security Administration will also accept as the date of filing the date a written request is mailed to it, if using the date of receipt "would result in a loss or lessening of

rights." In such a case, the date on the postmark will be used as the date of mailing. § 404.614(b)(2). If the postmark is unreadable or absent, the Administration will consider other evidence of when the claimant mailed the request. *Id.*

Smith's reliance on § 404.630 is misplaced. Smith's request was not considered filed until October 1, 2014, the date it was received by the Administration. Not only was the postmark absent, but there is no evidence that his request for appeal was ever mailed to the Administration during the appeals period because the agency never received anything from him. Other than his attorney's assertion that he timely mailed the request, Smith was unable to provide any "other evidence" to the Administration or the district court.

Smith also relies on the HALLEX.[3] The relevant provision, I-2-0-40, states that ordinarily a request for a hearing is considered filed as of the date it is received by the Social Security Administration office. *Request for Hearing Filing Requirements*, HALLEX (May 1, 2017), https://www.ssa.gov/OP_Home/hallex/I-02/I-2-0-40.html. However, the agency will also accept as the date of filing a postmark date on the envelope in which the request was mailed, if using the date of receipt would result in a loss of the claimant's rights. *Id.* If the postmark is unreadable or absent, the Administration considers the request timely mailed if it receives it by the seventieth day after the date on the notice of the determination or decision

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[3] Smith cites HALLEX provision I-2-505B in his brief, which does not exist. We can assume that he is referring to I-2-0-40 instead, which covers the filing requirements for requests for hearings.

being appealed. *Id.* It will also consider other evidence of when the claimant mailed the request. *Id.*

This is similar to our analysis above. This argument also fails to persuade us because Smith's request for appeal was not received by the seventieth day after the date on the notice of the decision being appealed. It was received four months after the time for appeal had expired. Additionally, none of the cases that Smith cites provide any support for his contentions.

2. Signature

Smith next argues that, because ALJ Paris signed the decision on behalf of ALJ Bowling, the presiding ALJ , this violated the procedures set forth in the HALLEX, denied him due process, and constituted fraud. This argument lacks merit. The relevant HALLEX provision, I-2-8-40, explains that when an ALJ conducts a hearing but becomes unavailable to sign the decision, the Hearing Office Chief ALJ may sign the decision on behalf of the presiding ALJ, if the presiding ALJ has approved the final draft decision. *Administrative Law Judge Conducts Hearing but Is Unavailable to Issue Decision*, HALLEX (Mar. 10, 2016), https://www.ssa.gov/OP_Home/hallex/I-02/I-2-8-40.html. Therefore, ALJ Paris, as the Hearing Office Chief ALJ, had the authority to sign the hearing decision if ALJ Bowling, the presiding ALJ , was unavailable. The record supports the district court's determination that the Commissioner complied with the HALLEX requirements because the signature on the ALJ's decision plainly states that ALJ Paris was signing for ALJ Bowling. The actions were appropriate under the HALLEX and Smith did not suffer due process violations. *See Creech v. Comm'r of Soc. Sec.*, 581 F. App'x 519, 521 (6th Cir.

2014) (reaching the same conclusion when confronted with the same argument by Smith's attorney). Furthermore, Smith has not shown any prejudice that he suffered as a result of ALJ Paris signing the decision on behalf of ALJ Bowling. *See id.*; *Lawrence v. Comm'r of Soc. Sec.*, 591 F. App'x 470, 471 (6th Cir. 2015) (per curiam) (finding no procedural violations and no prejudice when this argument was again raised by Smith's attorney).

3. Exhibit

Finally, Smith argues that his due process rights were violated when his 1988 decision was referenced by the ALJ but not included as an exhibit in the decision. He did not raise this argument with the district court, and therefore it is forfeited. *See Harper v. Sec'y of Health & Human Servs.*, 978 F.2d 260, 265 (6th Cir. 1992) (refusing to consider an issue not first raised before the Secretary); *cf. Millmine v. Sec'y of Health & Human Servs.*, No. 94-1826, 1995 WL 641300, at *2 (6th Cir. Oct. 31, 1995) (per curiam) (unpublished table decision) (finding that plaintiff's failure to object to an ALJ's possible bias during the administrative process constitutes a waiver of plaintiff's objection). However, even if Smith's factual allegations are true, he has not explained why they would amount to a due process violation, and similar arguments have been rejected as attempts to "dress up" claims as constitutional issues. *E.g.*, *Glazer v. Comm'r of Soc. Sec.*, 92 F. App'x 312, 315 (2004) (finding meritless the claimant's argument that the lack of an administrative record of her prior application had denied her due process); *Gosnell v. Sec'y of Health & Human Servs.*, 703 F.2d 216, 218 (6th Cir. 1983) (holding that due process does not require "the Secretary to retain records perpetually").

III. CONCLUSION

In sum, we find that the district court lacked jurisdiction to review the Appeals Council's dismissal of the untimely request for review and that Smith fails to make any colorable constitutional claims. We **AFFIRM**.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

RICKY LEE SMITH

PLAINTIFF

vs.

NANCY A. BERRYHILL,
Acting Commissioner of Social Security

DEFENDANT

ORDER

CIVIL ACTION NO. 16-3-DLB

*** *** *** *** *** ***

I. Introduction

This matter is before the Court upon Plaintiff Ricky Lee Smith's Motion for Relief under Rule 59(e). (Doc. # 15). Plaintiff seeks relief from this Court's January 12, 2017 Order dismissing his complaint. (Doc. # 13). For the reasons provided below, Plaintiff's Motion will be **denied.**

II. Factual and Procedural Background

Plaintiff filed an application for benefits under Title XVI of the Social Security Act. On February 18, 2014, Administrative Law Judge ("ALJ") Robert Bowling conducted a hearing on Plaintiff's claim. (Doc. # 9 at 1). On March 26, 2014, ALJ Don Paris issued a decision on behalf of ALJ Bowling denying Plaintiff's claim. (*Id.* at Ex. 1). Plaintiff submitted an appeal to the Appeals Council, and on November 6, 2015, the Appeals Council dismissed Plaintiff's request for review as untimely. (*Id.* at Ex. 7). On Janu-

ary 5, 2016, Plaintiff filed a complaint in this Court seeking review of the Appeals Council's dismissal of his request for review. (Doc. # 1).

In his Complaint, Plaintiff alleged that the Appeals Council improperly dismissed his request for review, and that he suffered due process violations because the ALJ who signed his hearing decision was not the same ALJ who conducted the hearing. *Id.* Defendant moved to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and for failure to state a claim, because the dismissal of a request for Appeals Council review is binding and not subject to further review. (Doc. # 8 at ¶ 4). This Court granted Defendant's Motion. (Doc. # 13).

On February 12, 2017, Plaintiff filed a motion for relief from the Court's Order pursuant to Rule 59(e). (Doc. # 15). Defendant having filed an Objection to Plaintiff's Motion (Doc. # 17), and Plaintiff having filed a Reply to Defendant's Objection (Doc. # 18), this matter is now ripe for the Court's review.

III. Analysis

A. Standard of Review

Federal Rule of Civil Procedure 59(e) permits parties to file a motion to alter or amend a judgment no later than twenty-eight days after the entry of the judgment. "[A] court may alter the judgment based on: '(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010). Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*,

128 S. Ct. 2605, 2617 n.5 (2008) (internal citations omitted). The decision to grant or deny such a motion is "within the informed discretion of the district court, reversible only for abuse." *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 467 (6th Cir. 2009) (internal quotations omitted).

Here, Plaintiff claims that the Court should alter its judgment based on errors of law. Specifically, Plaintiff asserts that the Court should have considered his tendered sur-reply, that his request for Appeals Council review was timely, and that the ALJ who conducted the hearing should have signed the hearing decision. (Doc. # 15). The Court will consider each of Plaintiff's arguments in turn.

B. Plaintiff's tendered sur-reply

In its prior Order, the Court noted that Plaintiff tendered a reply to Defendant's Reply in Support of its Motion to Dismiss. (Doc. # 13 at 1 n.1). In accordance with Joint Local Rule 7.1(g), the Court declined to consider the sur-reply. *Id.* Now, Plaintiff contends that the Court should consider the sur-reply, because Plaintiff's counsel misunderstood the Clerk's docket entry.[1] (Doc. # 15 at 1). Plaintiff's argument is not persuasive. The docket entry clearly stated that "leave of court is required to file a Sur-Reply" and directed Plaintiff to the appropriate local rule for reference. It is not the function of the Court to sua sponte explain to counsel how to comply with local

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[1] The Clerk's entry stated as follows: "Joint Local Rule 7.1(g) provides a motion is submitted for a decision...after the reply memorandum is filed; therefore, leave of court is required to file a Sur-Reply; clerk modified the text of the entry to state the pleading is TENDERED; NO further action required by counsel."

rules. If counsel did not understand the entry, he could have requested clarification from the Court or the Clerk's office. Moreover, the explanation provided in the Clerk's docket entry was clear. Plaintiff was free to request leave to file a sur-reply, but declined to do so. Accordingly, the Court was not required to consider the tendered sur-reply.[2]

C. Timeliness of request for Appeals Council review

Plaintiff asserts, once again, that his request for Appeals Council review was submitted within sixty days of receipt of the hearing decision. (Doc. # 15 at 2). The Social Security Administration's regulations governing when a form is considered filed provide as follows:

> (a) General rule. Except as otherwise provided in paragraph (b) of this section ... an application for benefits, or a written statement, request, or notice is filed on the day it is received by an SSA employee at one of our offices or by an SSA employee who is authorized to receive it at a place other than one of our offices.
>
> (b) Other places and dates of filing. We will also accept as the date of filing – ...
>
> (2) The date an application for benefits or a written statement, request or notice is mailed to us by the U.S. mail, if using the date we receive it would result in the

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[2] The Court notes that consideration of the sur-reply would not have altered its analysis. The sur-reply did not contain any arguments, nor offer any evidence, that differed from Plaintiff's Response to the Commissioner's Motion to Dismiss. (Doc. # 12).

> loss or lessening of rights. The date shown by a U.S. postmark will be used as the date of mailing. If the postmark is unreadable, or there is no postmark, we will consider *other evidence* of when you mailed it to us.

20 C.F.R. 404.614 (emphasis added). Despite the language in the governing regulations, Plaintiff has not offered any evidence to show that his request was timely. Absent some offer of proof, such as a postmark or receipt, the Court finds no reason to alter its prior judgment.

D. ALJ signature on the hearing decision

Finally, Plaintiff argues that the Court erred in finding that ALJ Paris was permitted to sign the hearing decision. (Doc. # 15 at 4). According to the Social Security Administration's procedural manual ("HALLEX"), when an ALJ approves a final draft decision but is unavailable to sign the decision, the Hearing Office Chief ALJ has the authority to sign the final decision. HALLEX I-2-8-40. Accordingly, this Court previously found that ALJ Paris had the authority to sign the hearing decision if ALJ Bowling was not available. (Doc. # 13 at 4).

Plaintiff contests this Court's prior finding for two reasons. First, Plaintiff claims that ALJ Bowling was, in fact, available. (Doc. # 15 at 4). However, Plaintiff does not offer any evidence in support of this assertion. The Court has no reason to believe that ALJ Bowling was available, yet neglected to sign the hearing decision. Second, Plaintiff claims that ALJ Paris has engaged in a "pattern of fraud" by signing hearing decisions for other ALJs. *Id.* at 5. In an attempt to support his accusation, Plaintiff

cites to another case in which ALJ Paris signed the hearing decision authored by a different ALJ – *Creech v. Comm'r of Soc. Sec.*, No. 5:13-CV-87-ART, 2013 WL 12101109 (E.D. Ky. Nov. 13, 2013). However, the Sixth Circuit affirmed the District Court's conclusion that the Hearing Office Chief ALJ may sign a decision on behalf of the ALJ who conducted the hearing. *Creech v. Comm'r of Soc. Sec.*, 581 Fed. App'x 519, 520 (6th Cir. 2014). Thus, Plaintiff's argument is without merit.

IV. CONCLUSION

Accordingly, for the reasons stated herein,

IT IS ORDERED that Plaintiff's Motion for Relief pursuant to Federal Rule of Civil Procedure 59(e) (Doc. #15) is **denied**.

This 11th day of May, 2017.

Signed By:
/s/David L. Bunning
David L. Bunning
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

CIVIL ACTION NO. 16-3-DLB

RICKY LEE SMITH

PLAINTIFF

vs.

CAROLYN W. COLVIN, Acting Commissioner of Social Security

DEFENDANT

MEMORANDUM ORDER

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This matter is before the Court on Defendant Commissioner's Motion to Dismiss Plaintiff's Complaint. (Doc. # 8). Plaintiff having filed a Response (Doc. # 9), and Defendant having filed a Reply to Plaintiff's Response (Doc. # 11), this matter is now ripe for the Court's review.[1]

Plaintiff filed an application for benefits under Title XVI of the Social Security Act. On February 18, 2014, Plaintiff attended a Social Security hearing before Administrative Law Judge ("ALJ") Robert Bowl-

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[1] Plaintiff also tendered a reply to Defendant's Reply. (Doc. # 12). However, Joint Local Rule 7.1(g) provides a motion is submitted for a decision after the reply memorandum is filed. Therefore, leave of court is required to file a reply to a Reply. Accordingly, the clerk entered a notice of deficiency and modified the entry as a tendered sur-reply. Because Plaintiff never sought leave to file, the tendered sur-reply (Doc. # 12) will not be considered by the Court.

ing. (Doc. # 9 at 1). On March 26, 2014, ALJ Don Paris issued a decision on behalf of ALJ Bowling denying Plaintiff's claim. (*Id.* at Ex. 1). Pursuant to the regulations governing further review of Social Security applications, Plaintiff had sixty (60) days to appeal the ALJ's decision to the Commissioner's Appeals Council. 20 C.F.R. § 416.1468. Plaintiff claims that he mailed a written request for review to the Appeals Council on April 24, 2014. (Doc. # 9 at 1). On September 21, 2014, Plaintiff faxed a correspondence to the Jackson, Kentucky District Office of the Social Security Administration, inquiring as to the status of his appeal, and attaching a copy of his written request dated April 24, 2014. (*Id.* at Ex. 3). In a letter dated October 1, 2014, a claims representative from the Jackson office informed Plaintiff that his request had not been placed in the "electronic folder," and that if the Appeals Council had received it, they would have mailed a receipt. (*Id.* at Ex. 4). The claims representative completed a Form HA-520 and mailed it to the Appeals Council, along with the written request that Plaintiff had attached to his September 21, 2014 correspondence. (*Id.*). Accordingly, the claims representative informed Plaintiff that his appeals request was filed as of that day, October 1, 2014. (*Id.*). On November 6, 2015, the Appeals Council dismissed Plaintiff's request for review for untimely filing. (*Id.* at Ex. 7). Plaintiff filed a complaint in this Court seeking review of the Appeals Council's dismissal of his request for appeal. (Doc. # 1).

Judicial review under the Social Security Act is limited to a "final decision of the Commissioner of Social Security made after a hearing." 42 U.S.C. § 405(g); 20 C.F.R. § 416.1400. When a claimant is not satisfied with an ALJ's hearing decision, the claimant may request review from the Appeals

Council. 20 C.F.R. § 416.1467. Review by a federal court is only available once a claimant has completed all of the steps of the administrative review process. § 416.1400(a)(5). The Appeals Council may "deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge." § 416.1467. If the Appeals Council dismisses the request for review as untimely, the dismissal is binding and not subject to further review. §§ 416.1471, 416.1472.

In *Hilmes v. Secretary of Health & Human Services*, 983 F.2d 67 (6th Cir. 1993), the plaintiff was notified that he had sixty days to request a hearing before an ALJ as to his challenge to the date established by the SSA for onset of his disability. Plaintiff sought an extension of this appeal time, but then failed to request a hearing until after the extension had expired. The ALJ dismissed the request for a hearing as untimely. *Id.* at 68. In affirming the district court's dismissal of plaintiff's petition, the Sixth Circuit noted that the dismissal as untimely of plaintiff's request for a hearing presented nothing to be reviewed by a district court under 42 U.S.C. § 405(g). *Id.* at 69.

> ... this reading of § 405(g) has been adopted through the federal circuits in cases considering the reviewability of dismissals of hearing requests and refusals to reopen claims. While most of these cases involved decisions based on *res judicata*, the reason for the dismissal of the hearing request – so long as it does not implicate constitutional concerns – does not appear to affect the analysis.

Id. at 70 (footnote omitted). This rule was also applied in *Young*, where the court ruled that the "Ap-

peals Council's order dismissing Young's appeal as untimely was not a 'final decision' as that term has been defined by the Act and regulations." *Young v. Commissioner of Social Security*, 89 F.3d 837, 1996 WL 343527, at *1 (6th Cir. June 20, 1996) (Unpublished, Table Decision). Thus, a decision by the Commissioner to dismiss a claimant's untimely request for an appeal before the Appeals Council is not a final decision subject to judicial review, absent the presence of a colorable constitutional claim.

Plaintiff raises two arguments in response to Defendant's motion to dismiss, neither of which establish a colorable constitutional claim. First, Plaintiff disputes the Appeals Council's factual determination that his appeal was untimely. However, Plaintiff does not offer any proof that he mailed his written request on April 24, 2014, aside from his own testimony. Absent independent evidence, such as a postmark or dated receipt, this Court cannot reverse the Appeals Council's determination that the written request for appeal was untimely.

Next, Plaintiff argues that he suffered due process violations because ALJ Paris signed the hearing decision, rather than the ALJ who presided over the hearing. (Doc. # 9 at 3). Due process principles do apply to Social Security proceedings. *Perales v. Richardson*, 403 U.S. 389, 401-02 (1971). The Sixth Circuit has held that the procedures in the Social Security procedural manual, referred to as "HALLEX," satisfy due process. *Robinson v. Barnhart*, 124 Fed. App'x. 405, 410 (6th Cir. 2005) (citing *Adams v. Massanari*, 55 Fed.Appx. 279, 2003 WL 173011, at **4-8 (6th Cir. Jan. 23, 2003)). HALLEX provides that when the ALJ who conducted a hearing is unavailable to sign the decision, the Hearing Office Chief

Administrative Law Judge may sign the decision on behalf of the presiding ALJ, if the presiding ALJ has approved the final draft decision. HALLEX I-2-8-40. Accordingly, ALJ Paris had the authority to sign the hearing decision if ALJ Bowling was not available. Therefore, because the ALJs' actions were appropriate under HALLEX, Plaintiff's due process rights were not violated.

As there is no judicial review available for the Commissioner's dismissal of Plaintiff's request for appeal as untimely, and Plaintiff has made no colorable constitutional claims, Plaintiff's Complaint must be dismissed. Accordingly,

IT IS ORDERED as follows:

(1) Defendant's Motion to Dismiss (Doc. # 8) is hereby **granted**; and

(2) Plaintiff's Complaint (Doc. # 1) is hereby **dismissed**, and this matter is **stricken** from this Court's active docket.

This 12th day of January, 2017.

Signed By:
/s/David L. Bunning
David L. Bunning
United States District Judge